SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1961

No. 315

RUTH E. TINSLEY,

Appellant,

—v.—

CITY OF RICHMOND, VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

JURISDICTIONAL STATEMENT

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CITY OF RICHMOND, VIRGINIA,

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ON APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

JURISDICTIONAL STATEMENT

Appellant, Ruth E. Tinsley, appeals from the judgment of the Supreme Court of Appeals of Virginia, entered on April 24, 1961, affirming a judgment of the Hustings Court of the City of Richmond, Virginia, convicting appellant of violating a municipal ordinance, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented. In the alternative, should the Court regard this appeal as having been improvidently taken, appellant prays that this Statement be regarded and acted upon as a petition for a writ of certiorari in accordance with 28 U. S. C. §2103.

Citation to Opinion Below

The Hustings Court of the City of Richmond did not render an opinion in this case. The opinion of the Supreme Court of Appeals of Virginia (R. 31) is reported at 202 Va. 707, 119 S. E. 2d 488, and is printed in the Appendix hereto, *infra*, p. 15.

Jurisdiction

This is a criminal proceeding in which appellant was convicted in the Hustings Court of the City of Richmond on April 11, 1960, of violating §24-17, Code of the City of Richmond, Virginia (R. 4). Appellant petitioned the Supreme Court of Appeals of Virginia for a writ of error contending there and below that the ordinance under which she was convicted was unconstitutional under the due process clause of the Fourteenth Amendment to the Constitution of the United States. Writ of error was granted (R. 1); April 24, 1961, the Supreme Court of Appeals affirmed the conviction, sustaining the validity of the ordinance in question (R. 46).

Appellant filed Notice of Appeal in the Supreme Court of Appeals on July 24, 1961. Jurisdiction of the Supreme Court of the United States to hear this appeal rests upon 28 U. S. C. §1257(2).

The following decisions sustain the jurisdiction of this Court to review the judgment by appeal in this case: *Atlantic Coast Line R. Co.* v. *Goldsboro*, 232 U. S. 548, 555; *Zucht* v. *King*, 260 U. S. 174, 176; *Union National Bank* v. *Lamb*, 337 U. S. 38, 40-41; *Chapman* v. *Crane*, 123 U. S. 540, 548; *Dorchy* v. *Kansas*, 272 U. S. 306, 308-309.

Constitutional and Statutory Provisions Involved

1. This case involves the validity of Section 24-17 of the Code of the City of Richmond, Virginia, 1957:

> Any person loitering or standing on the street, sidewalk or curb, shall move on or separate when required to do so by any member of the Police Bureau and shall cease to occupy such position on the street, sidewalk, or curb.

2. This case also involves section 1 of the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Whether a city ordinance punishing disobedience of a policeman's order to any person on the street to move on, but articulating no standard to guide the police, the courts, or the public, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, where applied to convict and punish appellant.

Statement

Appellant, Ruth E. Tinsley, was arrested in Richmond, Virginia on February 23, 1960, on a warrant charging that on that day she did "unlawfully refuse to move on when told to do so by police officer D. L. Nuckols in violation of Section 24-17 of the City Code" (R. 3). Appellant was brought before the Hustings Court of the City of Richmond, entered a plea of not guilty, and elected to be tried by the Court without a jury (R. 4-5). She was found guilty and a ten dollar fine was assessed on April 11, 1960

(R. 4). The Supreme Court of Appeals of Virginia granted a writ of error (R. 1), and on April 24, 1961, affirmed the judgment below (R. 46).

On February 23, 1960, at 3:55 p.m. (R. 13), appellant, Mrs. Ruth E. Tinsley, a Negro[1] 58 years of age, a long-time resident of Richmond and the wife of a practicing dentist in the City, was standing on the sidewalk near the corner of Sixth and Broad Streets in downtown Richmond (R. 22). She was standing under a clock, near a glass window of Thalhimer's Department Store while waiting, as she had done frequently in the past, to meet a friend (R. 22, 23, 24). The sidewalk was sixteen and a half feet wide; appellant was about thirty-five feet from the curb-line of the nearby corner (R. 14-15). She was alone, talking to no one, and was not at all disorderly (R. 17). People were walking up and down the sidewalk; no one was blocking it (R. 18).

Before reaching this corner, someone had given her a handbill stating "don't buy where you cannot eat, and turn your charge plate in, and something else" (R. 22). Thereupon, she decided not to enter Thalhimers, but merely to wait for her friend. (R. 23, 24).

That day the downtown area was crowded and a group of pickets was walking back and forth at Thalhimers. Patrolman Nuckols had been assigned to patrol the area with his trained attack dog, and to keep everyone in the area moving because of the picketing (R. 12). A newsboy earlier had been required to move from the corner, but later obtained permission to remain and sell papers (R. 13); persons waiting for buses had been directed to stand away from the building (R. 8); plainclothesmen were instructed to keep

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[1] The designation "CF", meaning colored female appears in the warrant (R. 3).

moving (R. 9). All this was said to be part of a police effort to keep the sidewalks open and avoid trouble in the area of picketing (R. 9). Nothing in the record indicates that Mrs. Tinsley was aware of any of these police activities or the reasons for them.

As soon as Mrs. Tinsley stopped at the store window, officer Nuckols approached her. He testified (R. 13-14):

> Q. Tell the Court exactly what happened as you approached Mrs. Tinsely? A. Well, before I got to Mrs. Tinsley I had asked some people were they waiting for the bus, and they said that they were. I said would you mind waiting for the bus at the bus stop. They moved over there, and I passed the Sixth Street door and Mrs. Tinsley was standing there, and I said that she would have to keep moving on. She stated why have I got to move. I said "Do you mind, please, to keep moving on?" She said how about them people there? I said that I hadn't got to them yet. By that time it was two gentlemen standing at the corner and they moved.
>
> She said are you going to tell me the reason why I have got to move. I said move, said that in a tone of voice where she was sure to hear, if she had been hard of hearing she certainly could have heard it. She had some packages in her hand, handbag, and she did like this (indicating by stamping foot).
>
> Q. So you asked her to move twice, please to move on? A. The first time I asked her "Would you mind, keep moving." The second time "Please move." And the third time I said "Move."
>
> Q. Did she move? A. No, sir. I placed her under arrest.

On cross examination, the officer testified (R. 25):

> Q. And the only thing that happened was you ordered her, I think on two occasions, twice on the same occasion, to move, and each time she asked you why.
>
> Why must she move. You never did tell her why she should move, did you? A. No, sir.
>
> Q. And then you just arrested her without telling her why you were arresting her, or why she was required to move? A. (Pause) No, I didn't tell her why she had to move (R. 18-19).

Appellant repeatedly testified that all she wanted to know was "why" she had to move on (R. 25):

> Q. Did you have any intention of violating any law? A. I had no intention. That is why I wanted to know why.
>
> Q. Did you know you were violating any law? A. I didn't know I was violating a law, because I thought you could ask why. That is all I wanted to know, was why. . . .
>
> • • • • •
>
> A. I didn't know where I had to go. People were crossing the street. There were people on the curb. There were people around everywhere. I wanted to know why that I had to move on.

The record contains no evidence of violence or apprehension of violence in the vicinity; nor does it reveal that normal passage of the sidewalk was blocked; nor does it display any reason why a citizen in the normal course of events might anticipate that he ought not to occupy a place on the street, except, of course, the officer's command to move on.

How the Federal Questions Were Raised and Decided

At the beginning of trial, appellant's counsel orally moved to dismiss the warrant on grounds that the ordinance violated the Fourteenth Amendment to the Constitution of the United States, "on its face" and "in its application to this particular case", because of its vagueness and because it gave the police officer unfettered authority to require citizens to move on (R. 6-7). The Court overruled the motion (R. 7).

On appeal, among the errors assigned was a claim that the ordinance "grants unlimited and unfettered authority to any police officer in the City of Richmond, Virginia, to require citizens on the street to separate or move on, without limitations, and therefore violates the Constitution of Virginia and the First and Fourteenth Amendments to the Constitution of the United States"; and a further claim that "said section is so vague as to violate the Constitution of the State of Virginia and the Constitution of the United States" (R. 2-3).

In affirming the conviction, the Supreme Court of Appeals of Virginia rejected all of the claims urged by petitioner in her assignments of error. The opinion below did not discuss the issues presented by appellant's assignments of error specifically in terms of the Fourteenth Amendment. However, the Court did treat and reject appellant's arguments and clearly sustained the validity of the statute. The Court held that the delegation of discretionary power to police officers under this ordinance was justified by the impracticability of prescribing a more definite rule (R. 35), saying that "the failure to set out a specific standard of conduct in the ordinance does not render the ordinance void" (R. 36); held that the officer on the facts of this case acted "reasonably" (R. 41-42); and that the statute was

sufficiently definite and was not "unconstitutional and void for the reason assigned" (R. 42). It is abundantly clear that disposition of the Fourteenth Amendment objections to the validity of the ordinance was necessary to a determination of the case, and that the ordinance was sustained against these challenges.

The Questions Are Substantial

This case involves a substantial constitutional issue affecting an important aspect of personal liberty, the right to make peaceful and ordinary use of public streets free from police interference under a criminal ordinance granting policemen absolute discretion to order persons to "move along."

The right to use the public streets is so clearly an aspect of personal liberty that the point need not be labored, as "[l]iberty under law extends to the full range of conduct which the individual is free to pursue, . . ."[2] It should be sufficient to note that liberty to use the streets is recognized in many decisions involving free speech, assembly, and religion,[3] as well as in cases involving loitering[4] and curfew laws.[5]

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[2] *Bolling* v. *Sharpe*, 347 U.S. 497, 499.

[3] See *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 515-516; *Schneider* v. *Irvington*, 308 U.S. 147, 160; *Saia* v. *New York*, 334 U.S. 558, 561, note 2; *Niemotko* v. *Maryland*, 340 U.S. 268; *Kunz* v. *New York*, 340 U.S. 290.

[4] *Deer Park* v. *Schuster*, 16 Ohio Ops. 485, 30 Ohio L. Abs. 466 (1940); *St. Louis* v. *Gloner*, 210 Mo. 502, 109 S.W. 30 (1908); *People* v. *Diaz*, 4 N.Y.2d 469, 151 N.E.2d 871 (1958); *State* v. *Hunter*, 106 N.C. 796, 11 S.E. 366 (1890); *Soles* v. *Vidalia*, 92 Ga. App. 839, 90 S.E.2d 249 (1955); *Commonwealth* v. *Carpenter*, 325 Mass. 519, 91 N.E.2d 666 (1950); *Territory of Hawaii* v. *Anduha*, 48 F.2d 171 (9th Cir. 1931). Cf. *People* v. *Wiener*, 254 App. Div.

The ordinance invoked against appellant furnishes no guide to define circumstances under which an officer may direct a person to move on. This is left entirely to police discretion. The only check on police discretion is subsequent judicial review in a criminal prosecution in which Virginia courts apply a generalized conception of "reasonableness". The ordinance permits a policeman to order a person about the streets for any reason a policeman deems fit and subjects the citizen to the peril of criminal punishment if he fails to move. The citizen is criminally liable if, upon judicial consideration of various circumstances not mentioned in the ordinance, nor defined elsewhere, a court determines that the police demand was reasonable. The invitation to official abuse in this ordinance is amply illustrated by the present case. Officer Nuckols simply demanded that appellant leave, refused to answer her repeated simple question as to why, repeated his demand more loudly, and then arrested her. The court, in determining that his actions were "fully justified" by the circumstances (R. 42), approved his refusal to answer appellant's simple question and concluded that the "officer was under no obligation to stand and argue with the defendant."[6]

695, 3 N.Y.S.2d 974 (1938); *Ex parte Mittelstaedt*, 164 Tex. Crim. 115, 297 S.W.2d 153 (1956). In *Pinkerton* v. *Verberg*, 78 Mich. 573, 584, 44 N.W. 579 (1889), the court said: "Personal liberty, which is guaranteed every citizen under our Constitution and laws, consists of the right of locomotion,—to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens."

[5] Cf. *Hirabayashi* v. *United States*, 320 U.S. 81, 111 (concurring opinion) describing a curfew as a restraint upon "liberty."

[6] Cf. *Thompson* v. *Louisville*, *infra*. With reference to altercation with policemen see also American Law Institute, *Model Penal Code, Tentative Draft No. 13*, pp. 13-18. (The reporters observed, at p. 14: "Hostility to policemen among considerable groups in the

The ordinance, as thus expounded, clearly contains no readily ascertainable standard of guilt or criminality which fairly warns a citizen that his conduct is prohibited. To be sure a citizen will know when he has not obeyed a command to move on. But neither the officer making such a demand, nor the citizen subjected to it, nor the court later reviewing it, is furnished by the statute with any standards for determining whether the policeman's command is one which may be safely disregarded (an "unreasonable" order) or must be obeyed to avoid a violation of law (a "reasonable" order). This determination can only be made by the courts (themselves operating in terms of a vaguely defined conception of reasonableness based upon circumstances possibly unknown to the defendant) on an *ad hoc* basis after the fact.

The courts have long recognized that one of the evils of vague criminal laws is that they confer upon judges and jurors the discretion to punish actions not clearly defined. See *Connally* v. *General Construction Company*, 269 U. S. 385, 395 ("varying impressions of juries"); *Burstyn* v. *Wilson*, 343 U. S. 495, 532 (Mr. Justice Frankfurter, concurring) (law did not "sufficiently apprise . . . of what may reasonably be foreseen to be found illicit by the law enforcing authority, whether court or jury or administrative agency"). *See, generally, Lanzetta* v. *New Jersey*, 306 U. S. 451.

Of course, it might be argued that a citizen could obey every police command and thereby gain safety from the Richmond ordinance; but this would require the peaceful,

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population rests in part on a feeling that arrests often reflect affront to the policeman's personal sensibilities rather than vindication of the public interest. It would therefore improve police prestige if the law and police administration took a conservative approach to penalizing petty wounds to policemen's sensibilities.")

harmless citizen to submit to every police demand on the public street, no matter how arbitrary or irrational. Many state courts have condemned loitering ordinances which, like the one in this case, were so vague that they failed to define the prohibited conduct.[7] These cases illustrate the prevalent judicial abhorrence of vague loitering laws.

In *Commonwealth* v. *Carpenter*, 325 Mass. 519, 91 N. E. 2d 666 (1950), the highest court of Massachusetts invalidated a law similar to that in the present case. That law provided in relevant part that "No person shall, in a street, unreasonably obstruct the free passage of foot-travelers, or willfully and unreasonably saunter or loiter for more than seven minutes after being directed by a police officer to move on. . . ". The Court observed that the portion of the law relating to obstruction of travel was not in issue and that no violence or breach of the peace was involved. Thus the reasoning of the Court is equally applicable here. The Court said at 325 Mass. 519, 521-522, 91 N. E. 2d 666, 667:

> In the view we take, the facts are unimportant. The part of the ordinance here considered we hold to be void on its face as repugnant to the due process clause of §1 of the Fourteenth Amendment to the Constitution of the United States and to Art. 12 of the Declaration of Rights of the Constitution of this Commonwealth. It undertakes to make criminal an intentional and unreasonable failure by one on a street to move on as soon as seven minutes have elapsed after a direction

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[7] *St. Louis* v. *Gloner*, *supra*; *People* v. *Diaz*, *supra*; *Deer Park* v. *Schuster*, *supra*; *Soles* v. *Vidalia*, *supra*; *Territory of Hawaii* v. *Anduha*, *supra*; *Commonwealth* v. *Carpenter*, *supra*; *Ex parte Mittelstaedt*, *supra*. See also *People* v. *Wiener*, 254 App. Div. 695, 3 N.Y.S.2d 974 (1938) (invalidating a law prohibiting disobedience to police officers' commands).

to that end given by a police officer. Prima facie, mere sauntering or loitering on a public way is lawful and the right of any man, woman, or child. This the Commonwealth concedes. Under the ordinance, such conduct continues conditionally lawful subject to a direction to move on by a police officer followed by unreasonable failure to comply and the expiration of seven minutes. *Not all idling is prohibited, but only that which is unreasonable. The vice of the ordinance lies in its failure to prescribe any standard capable of intelligent human evaluation to enable one chargeable with its violation to discover those conditions which convert conduct which is prima facie lawful into that which is criminal.* A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v. General Construction Co., 269 U. S. 385, 391; Lanzetta v. New Jersey, 306 U. S. 451, 453; Winters v. New York, 333 U. S. 507, 515-516; Commonwealth v. Slome, 321 Mass. 129, 133-134. (Emphasis supplied.)

Moreover, cases upholding loitering laws have approved only ordinances containing standards for the exercise of police discretion, i.e., limiting their application to certain areas, times, and circumstances.[8] These cases demonstrate

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[8] See, for example, *State* v. *Sugarman*, 126 Minn. 477, 148 N.W. 466 (1914) (obstructing sidewalk); *Tacoma* v. *Roe*, 190 Wash. 444, 68 P.2d 1028 (1937) (same); *Commonwealth* v. *Challis*, 8 Pa. Superior Ct. 130 (1898) (same); *State* v. *Starr*, 57 Ariz. 270, 113 P.2d 356 (1941) (limited as to certain times in specific area near schools and in terms of absence of "legitimate reason"); *People* v. *Johnson*, 6 N.Y.2d 549, 161 N.E.2d 9 (1959) (in schools); *People* v. *Merolla*, 9 N.Y.2d 62, 172 N.E.2d 541 (1961) (within in 500 feet of dock or pier). An apparent exception is *Benson* v. *Norfolk*, 163 Va. 1037, 177 S.E. 222 (1934).

the feasibility of drafting municipal ordinances so as to limit police discretion to dealing with clearly defined evils. Loitering laws which prevent obstruction of the streets, authorize quelling potential riots, or which serve other valid, defined legislative ends, need not confer on police officers unlimited power to restrain the liberty of citizens using the public streets.[9]

The conflict of the holding below in this case with the dominant tenor of other state court decisions on the same point of federal constitutional law makes it desirable that this Court settle the point. See *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 347-348, 380.

The importance of this issue should not be obscured by its presentation in the context of a conviction on a minor criminal charge, punished by a ten dollar fine. The importance of minor offenses such as this in our judicial system was well stated in a recently published discussion of disorderly conduct and related offenses by the American Law Institute in its *Model Penal Code, Tentative Draft No. 13*, p. 2:

> This article deals with a vast area of penal law which has received little systematic consideration by legislatures, judges, and scholars. The reason for this is that the penalties involved are generally minor, and defendants are usually from the lowest economic and social levels. Appeals are infrequent and pressures for legislative reform are minimal. Yet, this is a most important area of criminal administration, affecting the largest number of defendants, involving a great portion of police activity, and powerfully influencing the view of public justice held by millions of people.

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[9] Cf. American Law Institute, *Model Penal Code, Tentative Draft No. 13*, §§250.1(2), 250.12.

The importance attached to the administration of justice in cases involving minor offenses is further illustrated, of course, by this Court's review of *Thompson* v. *Louisville*, 362 U. S. 199. And see Douglas, "Vagrancy and Arrest on Suspicion," 70 Yale L. J. 1 (1960).

Review of this case would bring under the hand of this Court a case involving the infringement of a basic liberty, that of freedom of movement, by a means fundamentally wanting in the definiteness and freedom from arbitrary power that make up our concept of due process of law.

CONCLUSION

For the foregoing reasons it is submitted that this cause presents substantial federal constitutional questions of public importance which merit plenary consideration by this Court for their resolution.

Respectfully submitted,

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APPENDIX

Opinion Below

Present:

All the Justices.

Record No. 5232

RUTH E. TINSLEY

—v.—

CITY OF RICHMOND

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND
W. Moscoe Huntley, Judge

OPINION BY JUSTICE HARRY L. CARRICO

Richmond, Virginia, April 24th, 1961

Ruth E. Tinsley was arrested on a warrant which contained the charge that she did on the 23rd day of February, 1960, "unlawfully refuse to move on when told to do so by Police Officer D. L. Nuckols in violation of Section 24-17 of the City Code." Richmond City Code, 1957, Section 24-17. Upon her trial in the court below, without a jury, she was found guilty and her punishment was fixed at a fine of $10.00. She sought, and was granted, a writ of error to the judgment of conviction.

The defendant has assigned a number of errors which attack the constitutionality and validity of the ordinance under which she was arrested, tried and convicted. She also contends that the evidence presented against her was insufficient to sustain her conviction.

The material facts in the case are not in dispute.

On February 23rd, 1960, Thalhimer's Department Store, located in a block bounded by Sixth, Seventh, Broad and Grace Streets, in the City of Richmond, was being picketed by large numbers of persons who were carrying placards, and who were circling the store on the sidewalks adjacent thereto. In addition to the pickets, large crowds were on the sidewalks. Demonstrations of a similar nature had taken place previously in the same area, and some students taking part in the demonstrations had been arrested.

A number of police officers, some in uniform, and some not, had been assigned to the area. They had been instructed by their superiors to keep everyone moving on the sidewalks, and in compliance with these orders the pickets, onlookers, and even the police officers not in uniform, were directed to keep moving. Two of the police officers, Lt. L. H. Griffin and Patrolman D. L. Nuckols, testified that these actions were taken to keep the sidewalk open for pedestrian traffic and to avoid disorder.

Persons waiting for buses at a bus stop were required to move to a position, in line, near the curb.

A newsboy, selling newspapers on a corner of the block, was required by the police officers to move on, but was later permitted to return when the newspaper company by whom he was employed intervened with the police in his behalf.

Defendant, on this date, was on her way to Thalhimer's to pay a bill she owed there, and then planned to wait outside the store to meet a friend. As she neared the store, someone gave her a handbill which contained an admonition against dealing at Thalhimer's, so she decided not to go into the store to pay her bill, but instead to wait for her friend outside the store building, at the corner of Sixth and Broad Streets.

Defendant saw the pickets and the large crowds of people on the sidewalks.

She was standing against the window of the store when Officer Nuckols, in full uniform, approached her and asked her to move on. She asked him why she had to move. Again the officer asked her to move. She then pointed out to him some other people who were not moving and again asked him why she had to move. The officer said he hadn't yet gotten to the other people and then ordered her to move. She refused, and the officer arrested her on the charge set forth in the warrant.

The ordinance in question, Section 24-17 of the Code of the City of Richmond, is as follows:

"Any person loitering or standing on the street, sidewalk or curb, shall move on or separate when required to do so by any member of the Police Bureau and shall cease to occupy such position on the street, sidewalk or curb."

Defendant contends that the ordinance is unconstitutional in that:

1. It is an unlawful delegation of legislative power, because it fails to prescribe standards to guide the conduct of the members of the Police Bureau.

2. It is vague and ambiguous.

These two contentions will be dealt with together, since the arguments advanced by defendant in support of her first contention would, if valid, apply to her second contention, and vice versa.

We recognize the constitutional prohibition that ordinarily, in a statute or ordinance, a legislative body cannot delegate to administrative officers an exercise of discretionary power, without providing a uniform rule of action to guide such officers. We have, however, also recognized a well established exception to this rule. This excep-

tion applies in instances where it is difficult or impracticable to lay down a definite or comprehensive rule, or where the discretion relates to the administration of a police regulation and is essential to the public morals, health, safety and welfare.

It is our opinion that in the enactment of the ordinance, the city has validly exercised the powers given it under its charter, and has not unlawfully delegated its legislative power.

Section 2.04 of the charter grants to the City Council the power to adopt ordinances "for the preservation of the safety, health, peace, good order, comfort, convenience, morals and welfare of its inhabitants," and for the "prevention of conduct in the streets dangerous to the public" (Acts of Assembly 1948, p. 183).

In the exercise of these powers the City Council adopted Section 24-17 of the City Code of 1957. It should be noted that the ordinance now in dispute was first adopted in 1909 and has been re-enacted in the various city codes since that time, pursuant to previously existing charter authority.

The ordinance in question is of a regulatory nature and is designed to preserve the safety, peace, good order and convenience of the inhabitants of the City, and to prevent conduct in the streets dangerous to the public.

In order to carry out the purposes for which such a regulatory ordinance is adopted, the legislative body may place in the hands of the officers responsible for its enforcement, such discretion as is reasonable and proper to promote public peace and order. Moreover, it would be impossible, in such a case, to delineate in the ordinance itself, each circumstance which would be sufficient to warrant action by such officers. Under these conditions, the failure to set out a specific standard of conduct in the ordinance does not render the ordinance void.

This court has recognized this principle in the case of *Taylor* v. *Smith,* 140 Va. 217, 124 S. E. 259, where we said:

"We are of the opinion that a city may, in the execution of its police power, invest its administrative and executive officers with a reasonable discretion in the performance of duties devolved upon them to that end, whenever it is necessary for the safety and welfare of the public. Such a discretion is neither arbitrary nor capricious." (140 Va., at pages 231, 232.)

The court also quoted, with approval, the following from 12 A. L. R. 1435:

"It is also well settled that it is not always necessary that the statutes and ordinances prescribe a specific rule of action, but on the other hand, some situations require the vesting of some discretion in public officials, as for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule, or the regulation relates to the administration of a police regulation and is necessary to protect the public morals, health, safety, and general welfare."

We have previously upheld the validity of an ordinance similar to the one in question here, in the case of *Benson* v. *City of Norfolk,* 163 Va. 1037, 177 S. E. 222.

In the *Benson* case the City of Norfolk had, in 1907, in exercise of charter powers similar to those held by the City of Richmond, enacted the following ordinance:

"Sec. 483. Authority of police to require persons on street to move on.

"Any person or persons, vending or hawking goods, wares or merchandise, or loitering or standing on any of the streets or ways of the City, shall when required so to do by any member of the police force, move on, or any group of persons standing shall separate and move on, and

cease to occupy such position on the street or way, under penalty of not less than three nor more than fifty dollars for each offense, and in addition, in the discretion of the Police Justice, may be confined in jail not exceeding thirty days."

Benson assailed the constitutionality of the Norfolk ordinance on the grounds, among others not applicable here, that it constituted an unlawful delegation of legislative power in that it failed to lay down rules for the conduct of the police officers in enforcing the ordinance.

We said in the *Benson* case:

"The general power to regulate the use of the streets, and to do all things necessary or expedient for promoting the general welfare and peace of its inhabitants, and to make and enforce all ordinances would certainly seem to warrant the enactment of the ordinance in question. (163 Va., at page 1039.)

• • • • •

"It is, in our opinion, most salutary that the police officers of a municipality should have reasonable authority and discretion. Indeed, in exigencies, it is vital to the welfare of the community.

"Courts should assume, initially, that they will exercise their discretion and authority in a fair and reasonable way." (163 Va., at page 1040.)

We re-adopt these views and hold them to be controlling in the case now before us.

Legislative enactments of a similar nature have come under review in the courts of other jurisdictions. While there is a division of authority on the question of the validity of such regulations (See Am. Jur., Highways, Section 189, pp. 488, 489 and 65 ALR 2d, p. 1152) we adhere to our holding in *Benson* v. *City of Norfolk, supra,* that they are valid.

Typical of the cases approving such regulations is *People* v. *Galpern*, 259 N. Y. 279, 181 N. E. 572, in which the Court of Appeals of New York had under examination section 722 of the Penal Law (Laws 1923, c. 642, as amended by Laws 1924, c. 476) which provided that in cities of 500,000 inhabitants or more, it would constitute disorderly conduct if a person "congregates with others on a public street and refuses to move on when ordered by the police."

Galpern was standing on a sidewalk with five or six friends, in an orderly and inoffensive way. There were no other circumstances surrounding the incident. A police officer ordered the members of the group to move on, and Galpern refused to do so, and was arrested and charged with disorderly conduct. His conviction was upheld, and the Court said in its opinion:

"A refusal to obey such an order can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order. That is not the case here." (181 N. E., at page 574.)

See also *State* v. *Sugarman*, 126 Minn. 477, 148 N. W. 466; *City of Tacoma* v. *Roe*, 190 Wash. 44, 68 P. 2nd 1028.

In the *Galpern* case, as has been noted, the regulation required that a person had to congregate with others before an order to move on could be given. In the *Sugarman* case, three or more persons had to be assembled before such an order would be warranted. But in the *Roe* case, as with the ordinance now before us, a person standing alone on the street or sidewalk could be ordered to move on. Although these regulations differ in these respects, it will be seen from a reading of all of them that a common purpose is sought to be achieved—a free and unobstructed passage of the street or sidewalk. In each regulation the offense consists of standing on the street or sidewalk, and the

person's obligation to move on is conditioned upon a warning by a police officer to so move. The regulation has been upheld even though only one person of a group refused to move on and was arrested because he did not comply. The fact that such a regulation may be operative when a person is standing alone does not render the regulation void. The important consideration is whether the regulation is designed to afford free and unobstructed passage of the street or sidewalk for the preservation of public order, and the controlling factor in each arrest is whether or not the officer authorized to enforce the regulation has acted arbitrarily.

The test as to whether there has been a reasonable and proper exercise of the authority given the enforcing officers by the statute or ordinance is a matter for judicial determination, and depends upon the circumstances surrounding each arrest. If, upon judicial review, it appears that the police officer has acted arbitrarily, it is the duty of the courts to acquit the alleged offender. On the other hand, if the officer has acted reasonably to promote the public welfare and peace, his actions must be upheld.

In this case, where, at the time of the arrest, picketing of a highly controversial nature was taking place, crowds of people were on the sidewalks, some friendly and some hostile to the pickets, and tensions ran high, it was imperative that order be maintained, and that there be a "prevention of conduct in the streets dangerous to the public." (Richmond City Charter § 2.04.) Under these circumstances, when the police officer invoked the ordinance in question against the defendant, we cannot say that he acted arbitrarily. The facts fully justify the action taken by him.

Defendant complains that the ordinance is so vague and ambiguous as to render it unconstitutional and void.

The test of statutory definiteness has been laid down in the case of *Standard Oil Co.* v. *Commonwealth,* 131 Va. 830,

833, 109 S. E. 316, that "an ordinance of a regulatory nature must be clear, certain and definite, so that the average man may, with due care, after reading the same, understand whether he will incur a penalty for his action or not, and if not of this character it is void for uncertainty."

We think the ordinance in question amply meets this test, and is not unconstitutional and void for the reason assigned.

The defendant, in her argument that the ordinance is vague and ambiguous seems also to assert that the facts surrounding her arrest show that she was denied due process of law and the equal protection of the laws guaranteed to her under the Constitution of the United States and Section 11 of the Constitution of Virginia. She cites, as the basis for this assertion, the fact that the newspaper boy was permitted to return to the corner and was not again required to move on, while she was arrested. She states that this proves that the police officer discriminated against her in arresting her. Although this objection was not stated, assigned or presented as required by Rules of Court 1:8, 5:1 § 4 and 5:12 § 1 (d), the answer to the objection is simply that nothing appears from the ordinance itself or from the evidence presented in the trial court to show any discriminatory action in this case.

Finally, defendant contends that the evidence was not sufficient to support her conviction.

When the sufficiency of the evidence is challenged after conviction it is our duty to view it in the light most favorable to the prosecution, granting all reasonable inferences fairly deductible therefrom. The judgment should be affirmed unless "it appears from the evidence that such judgment is plainly wrong or without evidence to support it." § 8-491, Code, 1950; *Crisman* v. *Commonwealth*, 197 Va. 17, 87 S. E. 2nd, 796; *Toler* v. *Commonwealth*, 188 Va. 774, 51 S. E. 2nd 210.

We think the evidence is sufficient to support the judgment of the trial court, and that the judgment is plainly right. Defendant knew that a demonstration was taking place in the block where she was standing; she had notice of it from the handbill which had been given her, and she respected its admonition to the extent that she deviated from her purpose to go into the store to pay her bill. She saw the pickets and their placards; she saw the large crowds; she knew that students, who had taken part in the demonstrations, had been arrested. She deliberately placed herself in an emotion-packed situation, where at any moment trouble could have erupted, causing danger to the defendant and to the others on the sidewalk. She was told three times by a uniformed officer to move on; when she refused her offense was complete.

The police officer was under no obligation to stand and argue with the defendant. To have done so would have defeated the very purpose of the ordinance and the reason for keeping everyone moving—the maintenance of order. Under the circumstances, the officer was called upon to act with dispatch and firmness. Since he did not act arbitrarily, it is no defense to say that he should have acted more judiciously. As was said in the *Galpern* case, *supra*:

"The courts cannot weigh opposing considerations as to the wisdom of the police officer's directions when a police officer is called upon to decide whether the time has come in which some directions are called for." (181 N. E., at page 574.)

The defendant has been convicted under a valid ordinance by competent and sufficient evidence. The judgment of conviction is therefore *Affirmed.*

Judgment

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 24th day of April, 1961.

Record No. 5232

RUTH E. TINSLEY,

Plaintiff in error,

—against—

CITY OF RICHMOND,

Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 11th day of April, 1960

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be affirmed, and that the plaintiff in error pay to the defendant in error thirty dollars damages, and also its costs by it expended about its defense herein.

Which is ordered to be forthwith certified to the said hustings court.

A Copy,

Teste:

Clerk

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FILED
SEP 9 1961
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

October Term, 1961

No. 315

RUTH E. TINSLEY,

Appellant,

v.

CITY OF RICHMOND, VIRGINIA,

Appellee.

On Appeal from the Supreme Court of Appeals of Virginia

MOTION TO DISMISS APPEAL

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In the

Supreme Court of the United States

October Term, 1961

No. .....

RUTH E. TINSLEY,

Appellant,

v.

CITY OF RICHMOND, VIRGINIA,

Appellee.

On Appeal from the Supreme Court of Appeals of Virginia

MOTION TO DISMISS APPEAL

The appellee City of Richmond respectfully moves the Court to dismiss the appeal on the ground that it does not present a substantial federal question. If the Court should treat appellant's appeal as a petition for a writ of certiorari, appellee asks that this motion be treated as a brief in opposition thereto.

SUPPLEMENTARY STATEMENT

The statement of facts in appellant's Jurisdictional Statement is incomplete, and the conclusion on page 6 is erro-

neous. It is true that the record "contains no evidence of violence" at the time and place of appellant's arrest, but it is not true that it shows no "apprehension of violence". The record shows that a tense situation, with substantial apprehension of violence, existed on the streets of Richmond at the time and place of appellant's arrest and that order was maintained largely if not entirely by the very police action of which appellant complains.

On the date of the arrest large numbers of pickets were walking close together on the public sidewalks adjacent to Thalhimer's department store in the block bounded by Sixth, Seventh, Broad and Grace Streets in the central business district of Richmond (R. 9, 10, 12). They were carrying placards intended to persuade others against purchasing merchandise in the store, where the day before several Negroes had sought service at dining facilities within the store, refused to obey the management's direction to leave, and were arrested on trespassing charges. (See *Randolph v. Commonwealth*, 202 Va. 661, 119 S. E. 2d 817, appeal pending this Term.) The pickets were moving close together and were required by police to keep moving in single file (R. 8-13). Large numbers of people had gathered on the sidewalk (R. 10, 29). Because of the obvious danger of violence to the pickets and others, a large-scale program of police protection was immediately instituted in the block to preserve order and to keep the sidewalks unobstructed for passage of pedestrians. A police major and other supervisory officers were placed in command of a large detail assigned solely to maintaining order outside Thalhimer's R. 8-9). In addition to uniformed police, officers in plain clothes mingled with the crowd. The major in command issued orders that all persons on the sidewalk adjoining the store should be kept moving for the purpose of keeping the sidewalks open for pedestrian traffic and for prevention of

disorder. To avoid any appearance of discrimination, even the plainclothesmen were required to keep moving (R. 8-9). Persons waiting for a bus on the sidewalk on Broad Street in front of the store were allowed to stand only in the bus stop area at the curb (R. 8). A newspaper vendor selling papers was ordered to move and did so, but later, after a protest to a police captain by the newspaper management, he returned, stood on a corner, and was not again told to move (R. 13, 18). Every person required to move from a place on the sidewalk did so, with a single exception: the appellant.

THE QUESTION PRESENTED

In her appeal to this Court, appellant has abandoned her contentions that the ordinance was applied to her in a discriminatory manner and that the evidence was not sufficient to sustain her conviction. The sole question is:

Whether an ordinance requiring a person standing on a public sidewalk to move on or separate from other persons when required to so do by a police officer, applied without discrimination in a situation of potential violence, violates any right guaranteed under the due process clause.

NO SUBSTANTIAL QUESTION IS PRESENTED

The question presented is the same as that presented in *People* v. *Hussock*, 6 Misc. 2d 182, 23 N. Y. S. 2d 520; appeal dismissed and certiorari denied sub. nom. *Hussock* v. *New York*, 312 U. S. 659, except that freedom of expression and assembly are not involved in this case.[1]

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[1] Although appellant cites many New York cases, it is interesting to note that she omits the *Hussock* case; *Feiner* v. *New York*, *infra*, and *People* v. *Galpern*, *infra*.

Appellant was not a picket (R. 17, 23). She was not selling newspapers (R. 20). She was not distributing handbills (R. 22). She was not talking to anyone (R. 17).

In support of her novel proposition that there is a constitutionally protected right to stand in one place on a crowded public sidewalk under the circumstances of this case, appellant on page 8 of her Jurisdictional Statement quotes part of a sentence from *Bolling* v. *Sharpe*, 347 U. S. 497, 499. The full sentence, with a portion omitted by appellant in italics, is: "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted *except for a proper governmental objective.*"

It is difficult to imagine a more proper governmental objective than maintaining order and freedom of passage on city sidewalks.

Before determining whether the challenged municipal regulation imposes unreasonable restraints on those on the streets, it should be determined whether any constitutionally protected right is involved at all. "The right of the public on the highways is limited to *the right of passage*, with such stoppage as business or necessity may require * * *." *Commonwealth* v. *Challis*, 8 Pa. Super. 130, 132 (italics added). Appellant appears to recognize this, saying on page 14 of her Jurisdictional Statement that this case involves "infringement of a basic liberty, that of freedom of movement." This is not true. The absolute "liberty" contended for is that of *refraining from* movement from a place on a public sidewalk whose primary purpose is to provide freedom of movement for the public generally.

"Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary

purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets." *Schneider* v. *Irvington*, 308 U. S. 147, 160, quoted in *Robert* v. *Norfolk*, 188 Va. 413, 419-22, 49 S. E. 2d 697, 700, 701, and *Ex Parte Bodkin*, 86 Cal. App. 2d 208, 194 P. 2d 588, 590.

Even in free speech cases, this Court has recognized that liberty is not absolute, particularly when public streets are involved. "This Court respects, as it must, the interest of the community in maintaining peace and order on its streets." *Feiner* v. *New York*, 340 U. S. 315, 320.[2]

First it should be noted that Virginia prohibits governmental restraints on freedom of expression as fully as does this Court. *Robert* v. *Norfolk*, *supra*; *Edwards* v. *Commonwealth*, 191 Va. 272, 60 S. E. 2d 916; Va. Constitution, Sec. 12.

But in deciding this case, the Court "should first set to one side decisions which are apt to mislead rather than assist".[3] It need not concern itself with the cases cited by

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[2] The dissenting opinions say that police, instead of arresting Feiner for disorderly conduct, should have protected him. Despite restlessness of the crowd, there was "no showing of any attempt to quiet it; pedestrians were forced to walk into the street, *but there was no effort to clear a path on the sidewalk*." Black, J., 340 U. S. at 327 (italics added). When addressing unsympathetic audiences "speakers need police protection. If they do not receive it and instead the police throw their weight on the side of those who would break up the meetings, the police become the new censors of speech." Douglas, J., id. at 331. Cf. *Downie* v. *Powers*, 193 F. 2d 760 (10th Cir.).

[3] Frankfurter, J., concurring in *Niemotko* v. *Maryland*, 340 U. S. 268, 273, 276, *Kunz* v. *New York*, 340 U. S. 290, and *Feiner* v. *New York*, *supra*.

appellant which invalidated restraints on free speech or struck down vague ordinances making it criminal to do such things as "lounge", "loiter", "loaf" or "idle", regardless of surrounding circumstances.[4]

The Richmond ordinance mentions "loitering", but it is clear that as applied, and as construed by the court below, it is not just a loitering ordinance. It prohibits, under certain circumstances, *any* standing on a public way after being told by police to move or to separate from others. In applying it, there is no determination of whether a person standing on a sidewalk is also lounging, loitering, loafing, or idling.

There is nothing vague about the ordinance. It meets the test established by this Court. It is "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." It does not forbid or require the doing of an act "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application * * *". *Connally* v. *General Construction Co.*, 269 U. S. 385, 391.

The only question remaining is whether the ordinance delegates such a degree of discretion to the individual patrolman that its application must be held to deprive those to whom it is applied of liberty or property without due process of law. The Richmond ordinance bears little resemblance to that declared invalid in *Commonwealth* v. *Carpenter*, 325 Mass. 519, 91 N. E. 2d 666. There the crime was not

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[4] *St. Louis* v. *Gloner*, 210 Mo. 502, 109 S. W. 30; *People* v. *Diaz*, 4 N. Y. 2d 469, 151 N. E. 2d 871; *Territory of Hawaii* v. *Anduha*, 48 F. 2d 171 (9th Cir.); *Ex parte Mittelstaedt*, 164 Tex. Crim. 115, 297 S. W. 2d 153; *Soles* v. *Vadalia*, 92 Ga. App. 839, 90 S. E. 2d 249. False arrest and imprisonment cases, such as *State* v. *Hunter*, 106 N. C. 796, 11 S. E. 366, and *Pinkerton* v. *Verberg*, 78 Mich. 573, 44 N. W. 579, also are of little assistance.

committed unless (1) the defendant first was told by a policeman to move on, (2) he thereafter continued to "saunter or loiter for more than seven minutes", and (3) the policeman then determined, at the expiration of that time, that the sauntering or loitering was unreasonable. The officer was made legislator, prosecutor and judge. One person might stand on the street in his presence for an hour and go free if the officer considered it reasonable; another might saunter for seven minutes and be arrested if the officer did not deem his sauntering reasonable.

Richmond police have no such discretion under the ordinance in question here. When a person stands on a public sidewalk and an officer tells him to move, failure to move completes the offense. The officer is not empowered to rule on whether the refusal appears to him to be reasonable. The test of reasonableness, the court below said, is not one to be applied by the policeman. It "is a matter for judicial determination, and depends upon the circumstances surrounding each arrest. If, upon judicial review, it appears that the police officer has acted arbitrarily, it is the duty of the courts to acquit the alleged offender. On the other hand, if the officer has acted reasonably to promote the public welfare and peace, his actions must be upheld." 202 Va. 707, 713, 119 S. E. 2d 488, 492.

The court below cited *People* v. *Galpern*, 259 N. Y. 279, 181 N. E. 572, which upheld conviction of an attorney arrested for failing to move on while talking with five or six friends on a sidewalk free from crowds and the potential for violence shown in the record of the present case. There the statute deemed guilty of disorderly conduct one who "congregates with others on a public street and refuses to move on when ordered by the police." The New York Court of Appeals said:

"A refusal to obey such an order can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order. That is not the case here." 259 N. Y. at 284-85, 181 N. E. at 574. The Court of Appeals recognized the need for entrusting police with the exercise of reasonable discretion, as did a lower court in *People* v. *Friedman*, 6 Misc. 2d 271, 14 N. Y. S. 2d 389, 392.

As the court below said, the Richmond ordinance "is of a regulatory nature and is designed to preserve the safety, peace, good order and convenience of the inhabitants of the City, and to prevent conduct in the streets dangerous to the public. * * * The important consideration is whether the regulation is designed to afford free and unobstructed passage of the sidewalk for the preservation of public order * * *". 202 Va. at 710, 713; 119 S. E. 2d at 490, 492.

Such preservation of the right of the general public to freedom of passage over the sidewalks was the object of similar legislation upheld in *Ex Parte Bodkin*, *supra*; *Commonwealth* v. *Challis*, *supra*; *State* v. *Sugarman*, 126 Minn. 477, 148 N. W. 466; *Tacoma* v. *Roe*, 190 Wash. 444, 68 P. 2d 1028; *Benson* v. *Norfolk*, 163 Va. 1037, 177 S. E. 222, and *Chariton* v. *Fitzsimmons*, 87 Iowa 226, 54 N. W. 146.

Review of ten-dollar fines was justified in *Thompson* v. *Louisville*, 362 U. S. 199, because Kentucky law made the Louisville Police Court the court of last resort.

No such situation is presented here. Appellant was first convicted in the Richmond Police Court; received as a matter of right a retrial, *de novo*, on appeal to the Hustings Court, with right of jury trial,[5] which she waived (R. 5); obtained a writ of error from the Virginia Supreme Court

[5] Va. Code §§ 16.1-132, 16.1-136.

of Appeals for reconsideration of its holding in *Benson* v. *Norfolk*, *supra*, and was heard by the entire bench. Justice does not demand that she have a fourth day in court.

CONCLUSION

In her appeal, as in her conduct on the sidewalk, appellant recognizes no necessity for the interests of her community as a whole, in a time of tension, to be balanced against her desire to do exactly as she pleases. Since no federally protected right has been affected, the appeal should be dismissed.

Respectfully submitted,

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